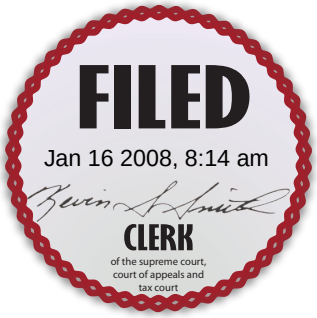

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IN THE COURT OF APPEALS OF INDIANA

JOHN W. MCVEY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 24A05-0707-CR-395
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE FRANKLIN CIRCUIT COURT
The Honorable J. Steven Cox, Judge
Cause No. 24C01-0503-FB-165

JANUARY 16, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARTEAU, Senior Judge

STATEMENT OF THE CASE

Defendant-Appellant John W. McVey ("McVey") appeals from the trial court's sentencing order after McVey pled guilty to dealing in methamphetamine, a Class B felony, maintaining an illegal drug lab, a Class D felony, and maintaining a common nuisance, a Class D felony.

We affirm.

ISSUE

The issues presented in this appeal for our review are as follows:

I. Whether the trial court abused its discretion by failing to provide an adequate sentencing statement; and

II. Whether McVey's sentence is inappropriate in light of the nature of the offenses and the character of the offender.

FACTS AND PROCEDURAL HISTORY

According to the factual basis for McVey's plea, on August 4, 2003, McVey unlawfully manufactured methamphetamine. He also knowingly maintained a building, structure, or other place that was used one or more times by persons to unlawfully manufacture controlled substances. McVey also possessed two or more chemical reagents or precursors, that being pseudoephedrine and anhydrous ammonia, with the intent to manufacture methamphetamine.

The State charged McVey with dealing in methamphetamine, a Class B felony, maintaining an illegal drug lab, a Class D felony, and maintaining a common nuisance, a Class D felony. McVey agreed to plead guilty to all three counts. The State filed with the trial court on December 27, 2006, a document entitled "Recommendation" signed by

the deputy prosecutor, McVey, and McVey's counsel. The Recommendation provides in relevant part as follows:

> 1. The (Deputy) Prosecuting Attorney anticipates that the defendant intends to enter a plea to the charge(s) listed below.
>
> 2. The State agrees to the following recommendation to the Court for sentencing:

Charge	Disposition
Dealing in Methamphetamine	15 years in the Indiana Department of Corrections[sic] with 3 years suspended to probation……
Illegal Drug Lab	3 years in the Indiana Department of Corrections[sic] with 0 year suspended to probation concurrent…..
Maintaining a Common Nuisance	3 years in the Indiana Department of Corrections[sic] with 0 year suspended to probation concurrent…

Appellant's App. p. 40. The "Recommendation" further provided as follows:

> 3. The signed recommendation shall be introduced into evidence by stipulation when defendant pleads guilty.
>
> 4. Defendant understands that the Court will review this recommendation along with any pre-sentence report and either accept or reject this recommendation. The parties hereto intend this recommendation to be a binding plea agreement, and intend to condition the Court's acceptance of defendant's guilty plea upon the imposition of the specific sentence as recommendation[sic] herein. Defendant has signed this recommendation upon the promise that the sentence imposed by the Court will be none other than that the recommended herein, and if this recommendation is rejected by the Court in whole or in part, then the defendant shall be entitled to withdraw the guilty plea.

Appellant's App. p. 41.

On January 3, 2007, the trial court conducted a hearing at which time the trial court accepted the plea agreement and ordered the preparation of a pre-sentence

investigation report. On January 31, 2007, the trial court sentenced McVey to a term of fifteen years imprisonment with three years suspended for dealing in methamphetamine, three years imprisonment for illegal drug lab, concurrent with the dealing count, and three years imprisonment for maintaining a common nuisance, concurrent with the dealing count.

The trial court's sentencing statement was as follows:

> COURT: The Court finds that you are thirty-five(35) years of age and understand the nature of said charge in which you plead guilty and the possible sentence that you could receive, that your plea of guilty is free and voluntary[sic] made, and there's a factual basis for you[sic] plea of guilty. We will sentence you in Count I, fifteen (15) years, three (3) suspended, five hundred dollar ($500.00) fine, one fifty-nine ($159.00) court cost, five hundred dollar ($500.00) countermeasure fee, one hundred dollar ($100.00) administrative fee, fifteen dollar ($15.00) monthly. You agree to testify the truth of [sic] the matter in all companion cases, forfeiture of all seized evidence. Count II, three (3) years no suspended time, fine, costs, and fees concurrent. Count III, three (3) years, fines, costs, and fees concurrent and credit for six hundred and sixty-three (663) days. Are those actual days?
>
> MR. KELLERMAN: Yes.
>
> COURT: Okay.

Tr. 13-14.

McVey now brings this appeal.

DISCUSSION AND DECISION

STANDARD OF REVIEW

McVey's crimes were committed prior to the effective date of the amendments to Indiana's sentencing statutes. Application of the new sentencing statutes to crimes committed before the effective date of the amendments violates the prohibition against *ex*

post facto laws. *See Creekmore v. State*, 853 N.E.2d 523, 528-29 (Ind. Ct. App. 2006). Therefore, we apply the prior version of the sentencing statutes to McVey's situation.

Sentencing decisions are generally left to the trial court's sound discretion and are reviewed only for an abuse of discretion. *Powell v. State*, 751 N.E.2d 311, 314 (Ind. Ct. App. 2001). We will not modify the sentence imposed by the trial court unless a clear abuse of discretion has occurred. *See Rose v. State*, 810 N.E.2d 361, 365 (Ind. Ct. App. 2004). An abuse of discretion has occurred if the trial court's decision is against the logic and effect of the facts and circumstances before the court. *Id*.

I. DEFECTIVE SENTENCING STATEMENT

McVey argues that under the prior sentencing scheme, because the sentences imposed were greater than the presumptive sentence for each felony, the trial court was required to make a sentencing statement that included an identification of significant aggravating and mitigating circumstances; a statement of the specific reason why each circumstance is aggravating or mitigating; and a demonstration that the aggravating and mitigating circumstances have been weighed to determine that the aggravators outweigh the mitigators. *See Powell*, 751 N.E.2d at 315.

McVey contends that the trial judge inappropriately used his discretion to enhance the sentences for each felony beyond the presumptive sentence for each offense. McVey further argues that the record is void of any statement to support the trial judge's decision to enhance the sentence.

Neither party argues that the "Recommendation" was not a plea agreement. Instead, the parties differ as to the nature of the plea agreement. For the reasons stated below, we agree with the trial court and the State that this is a fixed plea.

This is relevant because a defendant is entitled to challenge, on direct appeal, the merits of a trial court's sentencing decision where the trial court has exercised sentencing discretion. *See Allen v. State*, 865 N.E.2d 686, 689 (Ind. Ct. App. 2007). An "open plea" is one in which the sentence to be imposed is left to the discretion of the court. *Id*. McVey argues that the plea agreement in the instant case involves an open plea. Although not applicable to the arguments here, a "range" or "capped" plea is akin to the open plea by virtue of the discretion in sentencing afforded to the trial court. *Id*. A "fixed plea," however, is one that specifies the exact number of years to be imposed for sentencing. *Id*.

As stated above in this opinion, the number of years was spelled out in the agreement, the recommendation was signed by McVey, and was filed with the trial court without objection. After the trial court imposed the sentence, McVey did not object to his sentence.

The trial court may exercise discretion in accepting or rejecting a plea agreement and the sentencing provisions contained within the agreement. *Bennett v. State*, 802 N.E.2d 919, 921-22 (Ind. 2004). However, once the trial court accepts the plea agreement, the trial court is strictly bound by its sentencing provision and is in fact precluded from imposing any sentence other than that required by the plea agreement. *Id*. The trial court was not permitted to impose any other sentence than the fifteen-year

sentence, for the Class B felony, with three-year sentences for each of the Class D felonies, to run concurrently with the fifteen-year sentence.

As stated in *Walker v. State*, 420 N.E.2d 1374, 1379 (Ind. Ct. App. 1981):

> When a specific sentence disposition is contemplated by the parties to a plea agreement, the trial court, if it finds the recommended sentence unacceptable, must reject the entire plea agreement and set the case for trial. However, when the prosecutor makes a "nonbinding" sentence recommendation, the Indiana plea bargaining statutes cannot be construed so as to make the rejection of the entire plea agreement mandatory when the trial court does not accept the recommended sentence.

The plea agreement specifically states that the parties intended for the recommendation to be binding. Therefore, the trial court had to accept the sentencing recommendation along with the plea itself, or reject it all. Because the trial court could not exercise any discretion in sentencing McVey, any defect in the sentencing statement was harmless.

When the reviewing court finds an irregularity in a trial court's sentencing determination, we have at least three courses of action: 1) remand to the trial court for a clarification or new sentencing determination, 2) affirm the sentence if the error is harmless, or 3) reweigh the proper aggravating and mitigating circumstances independently at the appellate level. *Scott v. State*, 840 N.E.2d 376, 381 (Ind. Ct. App. 2006). Remand for resentencing is appropriate when we cannot say with confidence that the trial court would have imposed the same sentence if it considered the proper aggravating and mitigating circumstances. *Hart v. State*, 829 N.E.2d 541, 543 (Ind. Ct. App. 2005). Here, however, the sentence was spelled out in the agreement. If we were to remand the matter for resentencing the detailed statement would likely declare that the sentence is being imposed because that is the sentence to which the parties agreed.

Therefore, because the trial court was bound by the terms of the fixed binding plea, we can say with confidence that the same sentence would have been imposed in spite of the sentencing statement deficiency.

The trial court's failure to produce an adequate sentencing statement constituted harmless error. The trial judge did not abuse his discretion because he was bound by the terms of the recommendation.

II. INAPPROPRIATE SENTENCE

McVey also argues that his sentence is inappropriate in light of the nature of the offense and the character of the offender. *See* Ind. Appellate Rule 7(B). As discussed above, McVey's plea was not an open plea, or one involving a sentence cap at a certain number of years. McVey's guilty plea to the three felonies specifically called for a fifteen-year sentence, for the Class B felony, with three-year sentences for each of the Class D felonies, to run concurrently with the fifteen-year sentence. Only if the trial court is exercising discretion in imposing sentence may a defendant then contest on appeal the merits of that discretion on the grounds that the sentence is "inappropriate in light of the nature of the offense and character of the offender." *Rivera v. State*, 851 N.E.2d 299, 301 (Ind. 2006). Where a plea agreement calls for a specific term of years, if the trial court accepts the parties' agreement, it has no discretion to impose any thing other than the precise sentence upon which they agreed. *Id*. Therefore, because the trial court has no discretion in determining McVey's sentence, the issue is waived. *Id*.

Consequently, we will not revise McVey's sentence. Waiver notwithstanding, however, the limited factual basis set forth in the record leads us to the conclusion that there was nothing unusual or extraordinary about the commission of the crime. Therefore, we turn to McVey's character. McVey's criminal history consists of ten misdemeanor convictions, two felony convictions for theft, and recent felony conviction for possession of methamphetamine, a Class B felony. McVey had two probation violations while serving his sentences. McVey's pattern of criminal activity involving primarily alcohol-related convictions has escalated to possession of methamphetamine and the current offenses. Although McVey admits that he has a problem with substance abuse and addiction, he has not sought treatment for his problem, and the nature of his addiction and abuse has expanded. We find that the sentence imposed in not inappropriate in light of the nature of the offense and the character of the offender.

CONCLUSION

The trial judge did not abuse his discretion when imposing a sentence pursuant to the fixed term provision of the plea agreement. The sentence is not inappropriate in light of the nature of the offense or the character of the offender.

Affirmed.

RILEY, J., and VAIDIK, J., concur.